BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
Complainant,	)	
v.	)	**PCB 01-167**
ESG WATTS, INC., an Iowa corporation,	)	
Respondent.	)	

NOTICE OF FILING

To: Larry Woodward
Corporate Counsel
Watts Trucking Service, Inc.
P.O. Box 5410
Rock Island, Illinois 61204-5410

PLEASE TAKE NOTICE that on this date I mailed for filing with the Clerk of the Pollution Control Board of the State of Illinois, a REPLY BRIEF, a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,
Attorney General of the
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY: _____
THOMAS DAVIS, Chief
Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: October 8, 2003

CERTIFICATE OF SERVICE

I hereby certify that I did on October 8, 2003, send by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box a true and correct copy of the following instruments entitled NOTICE OF FILING and REPLY BRIEF

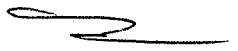
To: Larry Woodward
Corporate Counsel
Watts Trucking Service, Inc.
P.O. Box 5410
Rock Island, Illinois 61204-5410

and the original and ten copies by First Class Mail with postage thereon fully prepaid of the same foregoing instrument(s)

To: Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601

A copy was also sent by First Class Mail with postage thereon fully prepaid

To: Carol Sudman
Hearing Officer
Illinois Pollution Control Board
600 South Second Street, Suite 402
Springfield, Illinois 62704



Thomas Davis
Assistant Attorney General

This filing is submitted on recycled paper.

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
vs.	)	**No. 01-167**
	)	**(Enforcement)**
ESG WATTS, INC., an Iowa corporation,	)	
	)	
Respondent.	)	

REPLY BRIEF

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by Lisa Madigan, Attorney General of the State of Illinois, hereby files its Reply Brief to address some of the Respondent's arguments in the order such are presented in Respondent's Post-Hearing Brief. Additionally, Complainant hereby responds to Respondent's Motion for Leave to Supplement Record Instanter and does not object.

Overfill/Count IV

Complainant contends that there are no legal or technical impediments to the relocation of the overfilled wastes within the previously permitted contours. This representation was made in a July 30, 2001, letter from Attorney General's Office to counsel for Respondent. People's Exhibit 9. However, Respondent argues that such impediments did indeed exist as to the Taylor Ridge Landfill in contrast to the Viola Landfill situation.

First, as to legal issues, there was a court order governing the relocation of the overfilled wastes within the previously permitted contours at the Viola Landfill. People's Exhibit 12.[1]

[1]This Consent Order also required ESG Watts to address the groundwater contamination which was at issue in PCB 96-233. Respondent's Motion for Leave to Supplement provided a recent communication from the Attorney General's Office which included the following: "While Viola is no longer accepting refuse, a court order was entered in early August over Watts' failure to comply with groundwater remediation requirements at the site. A penalty of more than $284,000 was imposed."

These same concerns that a judicially sanctioned resolution of the vertical overfill problem was necessary had been expressed at a meeting following the July 30, 2001, letter; this is why a proposed court order was drafted and sent to Respondent. People's Exhibit 10. However, no reply was made to the suggested judicially sanctioned mechanism. People's Exhibit 11. Respondent ought not to hide behind its own inaction for not pursuing an agreed court order and now argue it merely sought to avoid being "prosecuted for proceeding without a permit." Respondent's Brief at page 3.

The permitted maximum elevation and final contours for the Taylor Ridge Landfill were imposed by the development permit and the previously approved closure plans. Closure activities consistent with those plans and the relocation of waste to conform with final contours should not in this context be considered as a "modification" requiring further permitting. The real reason for Respondent expressing this concern both at the time and now in the enforcement proceeding was that "in 1999 and through July 5, 2001 it was attempting to obtain approval of plans from the IEPA to allow overfilled waste to remain in place without relocation." Respondent's Brief at page 5. Watts wanted to leave the 34,100 cubic yards of overfilled waste in place not because of technical concerns as to odors, dust, noise, and other potential adverse effects upon neighboring residents but rather to avoid the relocation costs estimated to exceed $100,000. *See* People's Exhibit 4.

In arguing against a finding of liability for exceeding its maximum permitted elevation of 758 feet mean sea level, Respondent still contends that the equitable doctrine of *res judicata* applies but does not respond to Complainant's arguments that the Board lacks equitable powers. Nor does Respondent respond to Complainant's arguments that by pleading in its Answer that "said violation was known to the IEPA on or before January 1, 1995," the Respondent assumed an evidentiary burden that it has failed to satisfy. Respondent has failed to prove that the Illinois EPA had sufficient knowledge of the permitted elevation violation prior

to the December 29, 1999, resolution of 98 CH 20. People's Exhibit 1. Rather Watts merely contends that the Noble Earth landfill cover certification drawing dated October 16, 1996, and submitted in the sig mod application on November 11, 1996, informed the Illinois EPA of the over height problem. This was the same document at issue on the final day of hearing in PCB 96-107 and, on the basis of which, the Board subsequently found that "adequate evidence of this potential violation is lacking." PCB 96-107 (February 5, 1998) at page 4.[2] As Complainant noted in the Post-Hearing Brief, Mr. Jones recently testified that this document was "not an accurate representation of the landfill at the time [Mr. Brao] did his cover thickness investigation." Tr. at 189. Respondent makes no attempt to rebut or mitigate the testimony of its own engineer as to the lack of probative value of the Noble Earth drawing. Respondent also makes no attempt to challenge the Board's previous finding as to the lack of probative value of the Noble Earth drawing. In fact, if the Board were to hold (regarding *res judicata*) that it will exercise the equitable powers believed to have been statutorily delegated, then the Board (in order to be consistent) would also have to hold that Watts is estopped from challenging the Board's previous finding as to the lack of probative value of the Noble Earth drawing.

The issue of whether Respondent has marshaled enough relevant facts upon which to premise a *res judicata* defense is an easy one to determine. Did Mr. Jones testify that, during any of the several meetings from 1996 until 2000, he or one of the outside consultants informed

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[2]However, the Board totally missed the point of how this document came to be at issue so late in the prior enforcement proceeding: "This claim [of a potential overfill violation] is based upon the testimony of an ESG Watts' witness at the very final stages of the hearing. Throughout the entire discovery process, complainant never once raised an issue concerning vertical elevation in excess of permit limits. The Board agrees with ESG Watts that this allegation results in unfair surprise and disallows ESG Watts from providing an informed evidentiary response." These Noble Earth documents were produced to Complainant during discovery depositions conducted just one week before the commencement of trial after Complainant's motion to compel was granted to address discovery abuses; on Respondent's motion the documents were admitted at hearing on October 30, 1996. When the hearing resumed on December 12, 1996, the Complainant attempted to elicit testimony on the possibility of an overfill violation, utilizing the survey documents, but the Respondent objected and an offer of proof was rejected. In the present proceeding, of course, Respondent now makes "an informed evidentiary response" through Mr. Jones' testimony that "everybody knew that we were over height." Tr. at 190.

the Illinois EPA of the over height? Did Respondent attempt to elicit testimony from Illinois EPA permit engineers or inspectors as to what they knew and when they knew it? Ms. Munie's unchallenged testimony was based upon the May 2001 sig mod application, logged by the Illinois EPA Permits Section as no. 2001-459. People's Exhibit 5; Respondent's Exhibit 16. The Board must reject this purported affirmative defense.

Gas Management/Count II

Complainant contends that RTC's failure to perform the gas management activities permitted in 1996 does not relieve ESG Watts of liability. This is precisely what the circuit court found in its December 1999 Judgment Order. People's Exhibit 1. Respondent, however, argues that RTC's pending bankruptcy is "a major hurdle to resolving the odor problems." Respondent's Brief at page 9. RTC's contract with Watts provides exclusive rights to extract landfill gas from the Taylor Ridge Landfill. Tr. at 168. The purpose of such extraction was to be energy recovery and the objective of the 1996 permit was to be the control of emissions and odors. The consequences of the failure to achieve this purpose and that objective were the subject of Mr. Whitley's testimony.[3] It is obvious that the two aims are compatible; the proper extraction of landfill gas would prevent emissions from occurring and nuisance odors from resulting while generating electricity and profits.

While RTC's contractual rights to extract landfill gas for energy may be an asset of its Chapter 11 bankruptcy estate, the Respondent's permit obligations to control such emissions

[3]This testimony is unchallenged in Respondent's Brief: "many, many times I have to go in the house and shut the windows. I cannot stand the odors." Tr. at 89. When asked how the gas emissions had affected his life or interfered with his activities and enjoyment of his property, Mr. Whitley said that as far as sitting on his deck "sometimes it's completely impossible." Tr. at 91. During the past two or three years, it has been completely impossible for him to sit by the pond, which is closer to the landfill than the house. Tr. at 92. He is often prevented from working in his flower garden. Tr. at 93.

does not necessarily conflict with such rights or run afoul of the bankruptcy stay.[4] In fact, a rather convincing argument may be made that proper gas management by the landfill operator would act to *preserve* the landfill gas as a debtor's asset or property. Obviously, a bankruptcy stay does not affect the *generation* of landfill gases or prevent the *emissions* of such gases. In fact, as explained by Mr. Child in PCB 96-107, the pressure buildup makes release inevitable. This was one reason the flare was necessary.

Watts retains legal title to and possession of the landfill property, and has been ordered by the circuit court in 98 CH 20 and the Board in PCB 96-107 to control gas emissions. The bankruptcy of a third party does not excuse Watts' failure to comply with these previous orders. Moreover, the four and a half months that the flare was not functioning exacerbated the odor problems; there is no reasonable explanation in the record for why it took so long to fix the flare equipment. The Board must reject this purported affirmative defense.

Evidence in Aggravation

Complainant has presented economic benefit evidence and argument regarding Respondent's failure to pay previous penalties. In its Brief, Respondent argues that "the analysis of supposed economic benefits obtained by ESG Watts performed by Mr. Styzens is worthless." Respondent's Brief at page 10. Watts also criticizes the Attorney General's Office for "failing to introduce the agreement between the parties to pay the fine out of a special source of funds." Respondent's Brief at page 11. Finally, Watts argues that no economic benefit was accrued and that it has acted with due diligence to pursue compliance. Respondent's Brief at page 12.

The Respondent has failed to initiate and complete closure of the landfill in a timely

[4]The automatic stay under 11 U.S.C.§362 prohibits the commencement or continuation of any action to recover a pre-petition debt from the debtor or any attempt to gain possession of or exercise control over property of the bankruptcy estate.

fashion and has deferred the expenditure of $1,183,545 in closure costs that are proposed in the pending sig mod application. According to Mr. Styzens' calculations, the economic benefits of noncompliance with the closure requirements (including the overfill relocation) are at least $284,383. *See* People's Exhibit 20 and Tr. at 25-70. In response, Watts basically asserts that since it has no income with which to make expenditures, it has accrued no economic benefit by failing to make such expenditures. Watts also quibbles as to the length of the continuing noncompliance. Respondent suggest that its unapproved closure schedule of fifty weeks should be substituted for Mr. Styzens' "flawed assumptions" as to the pertinent time period. Respondent's Brief at page 10.

Some of Mr. Styzens' assumptions were that the regulations generally require the initiation of closure within thirty days of the final receipt of waste and that landfill closure is a process or series of actions governed by specifically applicable permits. In particular, he assumed that, *if the closure of the Taylor Ridge Landfill had commenced within thirty days of the final receipt of waste*, such work could be finished by October 16, 1998. He could have assumed that ESG Watts had ceased operations immediately upon the revocation of its permit by the Board on February 5, 1998; now, that would have been a *flawed assumption*. Of course, assumptions are made of potentialities and not of actualities.

In actuality, closure did not and still has not timely commenced. Therefore, Watts is getting an undeserved pass for approximately six months in 1998 and is not being charged for the months and years after May 2003. Of course, as it ludicrously asserts in its Brief, "ESG Watts did not know what closure activities were required or the manner in which they should be performed to meet IEPA requirements," presumably because it continues to disregard fundamental aspects (*e.g.* stormwater control) of the previously approved closure plans while seeking the elusive sig mod approval.

As to the alleged "agreement" to pay the penalties and accrued interest from the

proceeds of the sale by ESG Watts of the Sangamon Valley Landfill, Complainant simply responds that the "agreement" between the parties at the September 12, 2002, court hearing was that a proposed hypothecation agreement would be drafted by Respondent for review by the State and that copies of the Allied Waste purchase agreement would also be provided; in return, the State agreed to postpone the contempt hearing and to provide current information regarding the unpaid balances of penalties and interest. *See* Respondent's Exhibits 27 and 28. Copies of the Allied Waste purchase agreement were never provided and no hypothecation agreement was executed between the parties. While this is a collateral issue, it is indicative of Respondent's penchant to "cavalierly ignore" the history of dealings between the parties. Complainant's legitimate intent was to simply provide evidence that Watts has failed to pay the previously imposed penalties in PCB 96-107, PCB 96-233 and PCB 96-237; those penalties have recently been paid and only a relatively small amount of accrued interest remains outstanding. The Board is expected to give this evidence in aggravation its proper weight.

Lastly, as to whether *any* economic benefit was accrued, it is often difficult to obtain direct evidence of assets and liabilities, revenues and expenditures, and so forth, especially from privately held businesses; as noted, Respondent has refused to divulge the terms of the Allied Waste purchase agreement while contending that it has zero income. Even with public corporations such as Panhandle Eastern,[5] any documented cost savings and inferred profitability information are buried within reams of financial accounting reports and filings; economic benefit data must be extrapolated from analyses of the weighted average cost of capital and other esoteric concepts. Even with all of the extensive documentary evidence and expert witness testimony in the *Panhandle* case, the Board was only able to find a "good approximation of Panhandle's economic benefit from delayed compliance." PCB 99-191

[5]*People of the State of Illinois v. Panhandle Eastern Pipe Line Company*, PCB 99-191 (November 15, 2001).

(November 15, 2001) at page 33. Rather than setting any kind of benchmark for such considerations, the Board's decision in *Panhandle* is important for its holding: "That a violator will still incur costs to come into compliance does not eliminate the economic benefit of delayed compliance, *i.e.*, funds that should be spent on compliance were available for other pursuits." *Id.* at page 34. Respondent has conceded that there were indeed funds available for other pursuits; hundreds of thousands of dollars were wasted on deficient sig mod applications and defective appellate petitions. Furthermore, there has obviously been no subsequent compliance, and economic benefit will continue to accrue until the landfill is properly closed, the overfill relocated, and the gas emissions and stormwater runoff controlled.

As to due diligence, any efforts must be judged according to their effectiveness. It is not convincing to introduce at hearing a box of sig mod applications. These documents achieved nothing except permit denials from the Illinois EPA. It is not convincing to take four and a half months to fix the flare. It is not convincing to occasionally dredge silt from Mr. Whitley's pond. Finally, it is not convincing to blame the Illinois EPA and the Attorney General's Office for anything except "years of diligence in holding Watts' feet to the fire and forcing it to pay the citizens of Illinois what it owes for breaking the law." *See* press release submitted pursuant to Respondent's Motion for Leave to Supplement. Certainly, the Illinois EPA must be accountable for the permit denials

In closing, Complainant respectfully requests that the Board find liability on all counts, reject Respondent's affirmative defenses, order Respondent to immediately undertake effective action to cease and desist from further violations, and impose a civil penalty of one million dollars.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
LISA MADIGAN
Attorney General

State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY:_____
THOMAS DAVIS, Chief
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500 South Second Street
Springfield, Illinois 62706
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Dated: October 8, 2003

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

October 8, 2003

Dorothy Gunn, Clerk
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601-3286

Re: *People v. ESG Watts, Inc., an Iowa corporation*
PCB No. 01-167

Dear Clerk Gunn:

Enclosed for filing please find the original and ten copies of a NOTICE OF FILING and REPLY BRIEF in regard to the above captioned matter. Please file the originals and return a file-stamped copy to our office in the enclosed self-addressed stamped envelope.

Thank you for your cooperation and consideration.

Sincerely,

Thomas Davis
Assistant Attorney General
500 South Second Street
Springfield, Illinois 62706

TD/pp
Enclosures